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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ANITA IRVING,

Plaintiff and Respondent,

v.

SOLARCITY CORPORATION,

Defendant and Appellant.

A143961

(San Mateo County
Super. Ct. No. CIV-525975)

SolarCity Corporation (SolarCity) appeals from an order denying a stay of an action brought by plaintiff Anita Irving (Irving) under the Private Attorneys General Act of 2004 (PAGA), Labor Code section 2698 et seq. SolarCity contends the trial court's order effectively denied arbitration on threshold issues concerning Irving's standing as an "aggrieved employee" under PAGA. We affirm.

I. BACKGROUND

In November 2012, Irving accepted a position with SolarCity as a "Retail Energy Advisor – Part Time." As a condition of her employment, SolarCity required Irving to sign an arbitration agreement. Paragraph 12.A. of the agreement set forth the scope of the agreement to arbitrate: "Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law, and therefore this Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial." The same paragraph stated that "private attorney general representative actions are not covered within the scope of this Agreement and may be maintained in a court of law, but an

Employee may seek only in arbitration individual remedies for himself or herself under any applicable private attorney general representative action statute, and the arbitrator shall decide whether an Employee is an aggrieved person under any private attorney general statute.”

Paragraph 12.D. contained a class and representative action waiver: “[T]here will be no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action (“Class Action Waiver”), or in a representative or private attorney general capacity on behalf of a class of persons or the general public. Notwithstanding any other clause contained in this Agreement, the preceding sentence shall not be severable from this Agreement in any case in which the dispute to be arbitrated is brought as a class or collective action, or in a representative or private attorney general capacity on behalf of a class of persons or the general public.”

In December 2013, Irving sued SolarCity for (1) unlawful business practices in violation of Business and Professions Code section 17200; (2) failure to pay overtime wages in violation of Labor Code sections 204, 510, 1194, and 1198; (3) failure to provide accurate wage statements in violation of Labor Code section 226; and (4) failure to pay wages when due in violation of Labor Code sections 201, 202, and 203. Irving asserted these causes of action on her own behalf and on behalf of two alleged classes of SolarCity employees. Irving’s fifth cause of action was brought under PAGA, predicated on SolarCity’s alleged Labor Code violations.

SolarCity petitioned to compel all of Irving’s “individual claims” to arbitration pursuant to the agreement. SolarCity also sought to stay the superior court action pending arbitration of whether Irving was an “aggrieved employee” under PAGA.¹ Irving opposed the petition, arguing that although her individual claims could be

¹ A PAGA cause of action may only be brought by an “aggrieved employee,” which PAGA defines as “any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed.” (Lab. Code, § 2699, subds. (a) & (c).)

arbitrated, her PAGA cause of action must be “preserved and ‘maintained in a court of law.’ ”

After SolarCity filed its petition, our Supreme Court issued its opinion in *Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, holding that when an arbitration agreement “compels the waiver of representative claims under PAGA, it is contrary to public policy and unenforceable as a matter of state law.” (*Id.* at p. 384.) The trial court ordered further briefing in light of *Iskanian* so the parties could address whether “PAGA claims can only be brought as a ‘representative’ case, and thus whether there is really any ‘individual’ PAGA claim that can be severed and sent to arbitration.”

In its supplemental brief, SolarCity argued that *Iskanian* did not preclude an arbitrator from determining whether Irving was an “aggrieved employee” under PAGA. Irving contended that the arbitration agreement was unenforceable in its entirety because section 12.D. barred PAGA actions in contravention of *Iskanian* and could not be severed from the remainder of the agreement.

The trial court granted SolarCity’s petition to compel arbitration of Irving’s four “individual” causes of action. As to Irving’s PAGA cause of action, the court determined that “there is no individual PAGA claim subject to arbitration; as that statute can only be enforced through a representative action. Thus, the scope of [SolarCity’s] Petition seeking to compel arbitration of [Irving’s] ‘individual’ claims would not and could not include the PAGA claim.” The trial court interpreted the arbitration agreement as allowing Irving to proceed with her class action claims in court. The court stayed Irving’s individual causes of action, but otherwise denied SolarCity’s request for a stay.

This timely appeal followed.

II. DISCUSSION

Irving first contends that we lack appellate jurisdiction, and this case should be dismissed. Because the trial court granted SolarCity’s request to arbitrate Irving’s individual claim, and SolarCity is contesting only the trial court’s refusal to stay the PAGA claim, Irving argues the order is non-appealable. In the limited context of this case, we disagree.

While an order granting a petition to compel arbitration is not appealable, (*Ashburn v. AIG Financial Advisors, Inc.* (2015) 234 Cal.App.4th 79, 94) an order denying a petition to compel arbitration is (see Code Civ. Proc., § 1294, subd. (a)). Here, although the trial court granted SolarCity’s request to arbitrate Irving’s individual causes of action, the court effectively denied SolarCity’s request that the “aggrieved employee” issue should be decided by the arbitrator when it ruled that the PAGA cause of action could not be arbitrated and the superior court action would not be stayed. Thus, in this limited circumstance, because SolarCity can claim its request to arbitrate whether Irving was an “aggrieved employee” was denied, we will address this appeal on the merits.

This case is different from *Reyes v. Macy’s, Inc.* (2011) 202 Cal.App.4th 1119, where we dismissed an appeal from a trial court order granting a defendant’s petition to compel arbitration of individual causes of action and denying the defendant’s motion to dismiss a PAGA cause of action. (*Id.* at p. 1124.) Unlike SolarCity, the defendant in *Reyes* did not seek to compel arbitration of whether the plaintiff was an aggrieved employee under PAGA. Rather, it moved to *dismiss* the PAGA cause of action. (*Id.* at p. 1122.) Because an order compelling arbitration and an order denying a motion to dismiss are not appealable, we dismissed the appeal. (*Id.* at pp. 1122–1123.) Here, by contrast, the trial court effectively denied SolarCity’s request to arbitrate the aggrieved employee issue. So, we will address the merits of SolarCity’s argument that the PAGA action should have been stayed so the aggrieved employee status could be decided by the arbitrator.

Where, as here, the relevant facts are undisputed, we review a trial court’s denial of a petition to compel arbitration de novo. (*Peng v. First Republic Bank* (2013) 219 Cal.App.4th 1462, 1468.) On the merits, the trial court did not err in denying the request for a stay and thereby SolarCity’s request to arbitrate whether Irving was an aggrieved employee under PAGA.²

² SolarCity also asserts that the trial court erred by not dismissing Irving’s class action claims, but acknowledges that it cannot appeal the denial of a motion to dismiss.

In *Iskanian*, our Supreme Court held that an employment agreement that waives an employee’s right to bring representative claims under PAGA is “contrary to public policy and unenforceable as a matter of state law.” (*Iskanian, supra*, 59 Cal.4th at p. 384.) In reaching this holding, the Court explained that PAGA was “clearly established for a public reason, and agreements requiring the waiver of PAGA rights would harm the state’s interests in enforcing the Labor Code and in receiving the proceeds of civil penalties used to deter violations.” (*Id.* at p. 386.) A PAGA claim “is not a dispute between an employer and an employee arising out of their contractual relationship.” (*Ibid.*) Instead, it is “a dispute between an employer and the state, which alleges directly or through its agents—either the [Labor and Workforce Development] Agency or aggrieved employees—that the employer has violated the Labor Code.” (*Id.* at pp. 386–387.) Requiring an employee to litigate a portion of a PAGA claim in a forum selected by the employer interferes with “the state’s interests in enforcing the Labor Code.” (*Id.* at p. 387.)

In *Williams v. Superior Court* (2015) 237 Cal.App.4th 642 a trial court ordered that an employee’s “aggrieved employee” standing under PAGA was to be submitted to an arbitrator in order to give effect to the employee’s written agreement to waive representative claims but arbitrate individual claims. The appellate court reversed, concluding that under *Iskanian* the representative action waiver was ineffective and contrary to public policy and the PAGA cause of action was not divisible into separate individual and representative claims. Citing our decision in *Reyes v. Macy’s, supra*, 202 Cal.App.4th 1119, the court observed that “case law suggests that a single representative

Irving argues the trial court should have ruled the arbitration agreement was unenforceable in its entirety and refused to compel any claims to arbitration. Irving, however, has not appealed the trial court’s order compelling arbitration of her individual causes of action. Nor could she, because an order compelling arbitration is not appealable. (*Ashburn v. AIG Financial Advisors, Inc., supra*, 234 Cal.App.4th at p. 94.) Moreover, the general rule is that a respondent who has not appealed from a judgment may not assert error on appeal. (*Hutchinson v. City of Sacramento* (1993) 17 Cal.App.4th 791, 798.) For these reasons, we also deny Irving’s request for judicial notice.

PAGA claim cannot be split into an arbitrable individual claim and a nonarbitrable representative claim. (*Williams v. Superior Court, supra*, 237 Cal.App.4th at p. 649.) SolarCity seeks to distinguish *Williams* on the ground that this case involves a specific agreement to arbitrate the aggrieved person status under PAGA and *Williams* did not. The difference is immaterial. A party “cannot be compelled to submit any portion of his representative PAGA claim to arbitration, including whether he was an ‘aggrieved employee.’ ” (*Ibid.*)

Even though section 12.A. of the employee agreement provides that “the arbitrator shall decide whether an Employee is an aggrieved person under any private attorney general statute,” a PAGA cause of action cannot be split into an arbitrable individual claim and a nonarbitrable representative claim. (*Williams, supra*, 237 Cal.App.4th at p. 649.) A PAGA claim is representative and does not belong to an employee individually, and an employer should not be able to force an individual employee to arbitrate any portion of the claim. (See *Perez v. U-Haul Co. of California* (2016) 3 Cal.App.5th 408, 421; *Williams, supra*, 237 Cal.App.4th at p. 649.) The trial court correctly declined to stay the PAGA action in order to allow an arbitrator to make findings that would affect Irving’s status as an aggrieved employee within the meaning of PAGA (Lab. Code, § 2699, subd. (c)).

III. DISPOSITION

The trial court’s order declining to stay the PAGA claim and effectively denying SolarCity’s request to arbitrate the issue of whether Irving is an “aggrieved employee” under PAGA is affirmed. Irving shall recover her costs on appeal.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.